A

CHUA SENG SAM REALTY SDN BHD

v.

SAY CHONG SDN BHD & ORS AND OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
HISHAMUDIN MOHD YUNUS JCA
LINTON ALBERT JCA
[CIVIL APPEALS NO: W-02-1731-2009,
C W-02-1732-2009 & W-02-1733-2009]
7 SEPTEMBER 2012

TORT: *Negligence - Breach of duty - Whether proved - Actions taken by defendants in developing adjoining property - Whether collapse of*
D *retaining wall and landslides due to defendants' negligence - Whether defendants' act was effective cause of damage - But for test - Failure to establish causative link*

TORT: *Negligence - Causation - Whether proved - Development of*
E *adjoining property - Whether collapse of retaining wall and landslides due to defendants' negligence - Whether defendant's act was effective cause of damage - 'But for' test - Failure to establish causative link*

EVIDENCE: *Expert evidence - Conflict of evidence - Experts giving conflicting evidence on cause of collapse of retaining wall and landslides -*
F *Credibility and evidence of plaintiffs' expert witness in doubt - Court to examine scientific grounds and facts relied on by experts - Whether inferences drawn from findings are sound*

CIVIL PROCEDURE: *Action - Dismissal - Dismissal of counter-*
G *claim due to non-appearance of claimant*

The first plaintiff (Say Chong Sdn Bhd) was the registered owner of a piece of land ("the said land") on which it had erected a bungalow in 1980. The second and third plaintiffs were
H shareholders and directors of the first plaintiff company and occupiers of the bungalow. The said land was a hill slope and the bungalow was built at the uppermost part of the said land. Along the hill slope, below the bungalow, the first plaintiff had erected a retaining wall. The first defendant's land was located at the lower
I part of the hill slope adjacent to the said land. Around November 1993, the first defendant leased her land to the second defendant (Chua Seng Sam Realty Sdn Bhd). The second defendant desired to build a bungalow on the land. The third defendant (Pembinaan

BSH Sdn Bhd) was appointed as the contractor, the fifth defendant was appointed as the consulting engineer and the sixth defendant was appointed as the architect for the construction of the second defendant's bungalow. The excavation work began on the first defendant's land in the first week of December 1993 and on 11 December 1993 the first plaintiff's retaining wall collapsed resulting in a landslide. The plaintiffs commenced legal action against the defendants alleging that the excavation work was carried out in a negligent manner. The first and second defendants counter-claimed against the first plaintiff alleging that the first plaintiff was negligent in constructing and maintaining the safety of the retaining wall resulting in it collapsing and causing damage to the first and second defendants' land. Both the plaintiffs' expert witness (PW5) and the defendants' expert witness (DW7) gave differing evidence as to the cause of the collapse of the retaining wall. The learned High Court Judge had allowed the plaintiffs' claim but had dismissed the first and second defendants' counter-claims. The appeals herein were filed against the said decision.

Held (allowing the appeals with costs; except the first defendant's appeal on dismissal of her counter-claim)
Per Hishamudin Mohd Yunus JCA:

(1) The plaintiffs failed to prove on a balance of probabilities that it was the excavation work that was being carried out on the first defendant's land that had caused the retaining wall to collapse. It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. (paras 31-32)

(2) The credibility and evidence of the plaintiffs' expert witness was in doubt. His evaluation and subsequent findings of the cause of the collapse of the retaining wall was based heavily on the analysis of the stability of the slope. However, the analysis was never prepared by him. As such he could not be said to have personal knowledge of the analysis or calculations made therein. To make matters worse, the said analysis was prepared some six years after the collapse of the wall. (para 39)

(3) The 'but for' test is important in determining whether or not the defendants' act was the main factor causing the damage suffered by the plaintiffs. The wall collapsed because of its defective structure and its precarious state. The plaintiffs failed to establish a causative link in proving that the collapse of the retaining wall was caused by the carrying out of the excavation work. (paras 44-45)

(4) In treating conflicting expert evidence, the court, besides examining the credibility of the experts, should also examine the scientific grounds and facts relied by the experts and whether, when taken in totality, the inferences drawn from their findings are sound or otherwise; *Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte. Ltd.* and *Eugene HL Chan Associate (Third Party)* (refd). (para 48)

(5) The first defendant had not come to court to testify as to what damage she had suffered as a result of the collapse of the wall. Therefore, the learned High Court Judge was correct in dismissing her counter-claim against the first plaintiff. (para 52)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif pertama (Say Chong Sdn Bhd) adalah pemilik berdaftar sebidang tanah ("tanah tersebut") di mana sebuah banglo telah didirikan pada tahun 1980. Plaintif kedua dan ketiga adalah pemegang saham dan pengarah-pengarah syarikat plaintif pertama dan penghuni-penghuni banglo. Tanah tersebut adalah cerun bukit dan banglo telah dibina pada bahagian tertinggi tanah tersebut. Sepanjang lereng bukit, di bawah banglo, plaintif pertama telah mendirikan sebuah tembok penahan. Tanah defendan pertama berkedudukan di bahagian lebih rendah lereng bukit bersebelahan dengan tanah tersebut. Sekitar November 1993, defendan pertama telah memajak tanahnya kepada defendan kedua (Chua Seng Sam Realty Sdn Bhd). Defendan kedua ingin membina sebuah banglo di atas tanah itu. Defendan ketiga (Pembinaan BSH Sdn Bhd) telah dilantik sebagai kontraktor, defendan kelima dilantik sebagai jurutera perunding dan defendan keenam dilantik sebagai arkitek bagi pembinaan banglo defendan kedua. Kerja penggalian bermula di tanah defendan pertama pada minggu pertama Disember 1993 dan pada 11 Disember 1993 tembok penahan plaintif pertama

rebah mengakibatkan tanah runtuh. Plaintif memulakan tindakan undang-undang terhadap defendan-defendan dengan dakwaan bahawa kerja penggalian telah dijalankan dengan cuai. Defendan pertama dan kedua menuntut balas terhadap plaintif pertama dengan dakwaan bahawa plaintif pertama telah cuai dalam membina dan mengekalkan keselamatan tembok penahan yang mengakibatkan ia runtuh dan menyebabkan kerosakan kepada tanah defendan pertama dan kedua. Saksi pakar plaintif-plaintif (PW5) dan saksi pakar bagi pihak defendan-defendan (DW7) telah memberi keterangan berbeza mengenai punca keruntuhan tembok penahan. Yang Arif Hakim Mahkamah Tinggi telah membenarkan tuntutan plaintif-plaintif tetapi telah menolak tuntutan balas defendan pertama dan kedua. Rayuan-rayuan telah difailkan terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan-rayuan dengan kos; kecuali rayuan defendan pertama berhubungan tuntutan balasnya)
Oleh Hishamudin Mohd Yunus JCA:

(1) Plaintif-plaintif gagal membuktikan pada imbangan kebarangkalian bahawa ia adalah kerja penggalian yang dijalankan ke atas tanah defendan pertama yang telah menyebabkan keruntuhan tembok penahan. Ia adalah undang-undang mantap bahawa dalam tindakan kecuaian, plaintif harus membuktikan bahawa tindakan defendan adalah punca berkesan kecederaan yang dialami oleh plaintif. Tanpa perhubungan kausa yang boleh dibuktikan oleh plaintif, tuntutan tidak boleh berjaya.

(2) Kredibiliti dan keterangan pakar saksi plaintif meragukan. Penilaian dan penemuan pakar saksi tersebut mengenai punca keruntuhan tembok penahan berdasarkan sepenuhnya kepada kestabilan cerun. Walau bagaimanapun, analisis itu tidak disediakan olehnya. Oleh itu beliau tidak boleh dikatakan mempunyai pengetahuan peribadi analisis atau pengiraan yang dibuat. Untuk memburukkan lagi keadaan, analisis tersebut disediakan enam tahun selepas keruntuhan tembok itu.

(3) Ujian 'but for' adalah penting dalam penentuan sama ada tindakan defendan-defendan adalah faktor utama yang menyebabkan kerosakan yang dialami plaintif-plaintif. Tembok

A itu telah runtuh sebab strukturnya yang cacat dan keadaannya yang tidak selamat. Plaintif-plaintif gagal membuktikan perhubungan kausa dalam membuktikan keruntuhan tembok penahan itu disebabkan kerja-kerja penggalian yang dibuat.

B **(4)** Dalam menangani keterangan saksi pakar yang bercanggahan, mahkamah, selain daripada memeriksa kredibiliti saksi-saksi pakar, harus juga memeriksa alasan-alasan dan fakta-fakta saintifik yang disandarkan oleh pakar-pakar dan sama ada, secara keseluruhan, inferens-inferens yang diambil daripada C penemuan mereka adalah betul atau sebaliknya. *Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte. Ltd.* dan *Eugene HL Chan Associate (Third Party)* (dirujuk).

(5) Defendan pertama tidak hadir di mahkamah untuk memberi D keterangan mengenai apa kerosakan yang telah dialaminya akibat keruntuhan tembok itu. Oleh itu, Hakim Mahkamah Tinggi betul apabila menolak tuntutan balasnya terhadap plaintif pertama.

Case(s) referred to:

E *Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party) [1984] 1 LNS 3 HC* ***(refd)***

Other source(s) referred to:

Clerk & Lindsell on Tort, 20th edn, paras. 2-01, 2-09

F *(Civil Appeal No: W-02-1731-2009)*
For the appellant - B Thangaraj; M/s Thangaraj & Assocs
For the respondents - Jerry Ling; M/s Lee Ling & Partners

(Civil Appeal No: W-02-1732-2009)
For the appellants - Mohd Zainuddin Omar; M/s Arshad Azhari & Assocs
G *For the respondents - Jerry Ling; M/s Lee Ling & Partners*

(Civil Appeal No: W-02-1733-2009)
For the appellant - Christie Soosay Nathan (Y K Leong & S K Lit with him); M/s Lit & Co
For the respondents - Jerry Ling; M/s Lee Ling & Partners
H

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S3-23-58-1994]

Reported by Amutha Suppayah

I

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] These three related appeals before us are by consent of the parties, to be heard together, namely:

(1) Civil Appeal No. W-02-1731-2009;

(2) Civil Appeal No. W-02-1732-2009; and

(3) Civil Appeal No. W-02-1733-2009.

[2] These appeals emanate from a High Court case, namely, Kuala Lumpur High Court Civil Suit No. S3-23-58-1994.

[3] At the High Court, the learned judge gave judgment in favour of the plaintiffs. The judgment obtained was against all the defendants except the fourth defendant, Sime AXA Assurance Berhad, who, before the trial, in an interlocutory application, had successfully applied to the court to have the suit against it be struck off.

[4] All the remaining defendants, except the third defendant, that is to say, Pembinaan BSH Sdn Bhd (thus Pembinaan BSH Sdn Bhd is not a party to these appeals), were dissatisfied with the decision. They are appealing to this court.

[5] The claim of the plaintiffs in the High Court action was essentially for damages for the tort of negligence allegedly committed by the defendants against the plaintiffs.

[6] There are also counter-claims by the first and second defendants against the first plaintiff, also for the tort of negligence.

[7] The learned High Court judge had allowed the plaintiffs' claim, but had dismissed the first and second defendants' counter-claims.

[8] Having allowed the plaintiffs' claim for negligence, the learned High Court judge did not determine the quantum of damages. Instead he made a further order that damages are to be assessed by the Senior Assistant Registrar.

[9] We are allowing the defendants' appeal with costs, except with regard to the first defendant's counter-claim.

[10] The second defendant is not appealing against the dismissal of its counter-claim.

[11] We, therefore, set aside the order of the High Court, except that part of the High Court order dismissing the first defendant's counter-claim.

[12] Our decision is unanimous.

[13] In our judgment, the plaintiffs (the respondents before us) have failed to prove on a balance of probabilities that the defendants (the appellants before us) were guilty of committing the tort of negligence against the plaintiffs.

[14] In our judgment, the findings of the learned High Court judge are against the weight of evidence, and, therefore, warrant interference by this court.

[15] We will begin by setting out briefly the facts of the case.

[16] The first plaintiff (Say Chong Sdn Bhd) is a company and the registered owner of a piece of land at Bukit Pantai, Kuala Lumpur. On this piece of land it had erected a double storey bungalow. It was built in 1980.

[17] The second and third plaintiffs (Dr Ng Say Hong and Mdm Chung Li Khoon) are husband and wife. They are the only shareholders and directors of the first plaintiff company. They and their two children were also occupiers of the bungalow.

[18] The first plaintiff's land is in fact a hill slope. The said bungalow was built at the uppermost part of the land. Along the hill slope, below the bungalow, the first plaintiff had erected a retaining wall of about 22 feet high and had filled it up with earth brought onto the land from somewhere else. This retaining wall was erected around 1983. The first plaintiff's bungalow is located within this retaining wall. The filled-up retaining wall enabled the first plaintiffs' bungalow to have a garden and some area of level ground as part of its compound.

[19] The first defendant is one Mdm Chuah Guat Kooi. Her land is located at the lower part of the hill slope. Her land is adjacent to the first plaintiff's land.

[20] About eight to ten days before the end of November 1993, the first defendant entered into a lease agreement with the second defendant company (Chua Seng Sam Realty Sdn Bhd). By this agreement, the first defendant leased out her land to the second defendant for a term of ten years.

[21] The second defendant company was desirous of building a bungalow on the land that it had leased from the first defendant. So, it appointed the third defendant, a company (Pembinaan BSH Sdn Bhd), as a contractor to build the bungalow. For the construction of the bungalow, the second defendant appointed the fifth defendant (Encik Wan Husin), a qualified civil engineer, as the consulting engineer and the sixth defendant (Encik Abdul Rashid), a qualified architect, as the architect.

[22] It is not disputed that the third defendant was an independent contractor.

[23] Excavation work by the third defendant on the first defendant's land began after the second defendant (as lessee) had taken possession of the first defendant's (the lessor) land; and, subsequently, after the third defendant, as the building contractor, had taken constructive possession of the building site. The excavation work began in the first week of December 1993.

[24] The excavation work was carried out within the first defendant's land. There is a distance of about 20 feet between the excavation point and the first plaintiff's retaining wall.

[25] On 11 December 1993, the first plaintiff's retaining wall collapsed resulting in a landslide.

[26] The plaintiffs allege that the defendants had carried out the excavation work in a negligent manner and that caused the first plaintiff's retaining wall to collapse.

[27] The defendants deny the allegation. Instead, the defendants' allege that the first plaintiff was negligent in constructing and maintaining the safety of the retaining wall resulting in the wall being structurally defective and in a precarious state. And it was this precarious state of the retaining wall that had caused it to collapse, and not the excavation work that was carried out by the third defendant.

[28] The first and second defendants counter-claim against the first plaintiff for negligence. The first defendant pleads in her statement of defence and counter-claim that the first plaintiff's retaining wall had collapsed onto her land, thereby causing damage to her land.

[29] The second defendant pleads in its statement of defence and counter-claim that the collapse of the first plaintiff's retaining wall onto the first defendant's land had caused the second defendant company to incur financial loss.

[30] It is significant to note that despite the first defendant having a counter-claim, yet she did not come to court to give evidence to prove her claim against the first plaintiff.

[31] In our judgment, the plaintiffs have failed to prove on a balance of probabilities that it was the excavation work, that was being carried out by the third defendant (the independent contractor) on the first defendant's land (now leased to the second defendant), that had caused the retaining wall on the first plaintiff's land to collapse.

[32] It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. The passage found in para. 2-01 of the text of *Clerk & Lindsell on Tort* (20th edn.) states this basic principle in the following manner:

> In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage. In these torts, and indeed in torts actionable *per se* if substantial damages are sought, the claimant must establish that:
>
> (1) the defendant's conduct did in fact result in the damage of which he complains, and
>
> (2) the damage is not in law too remote a consequence of the defendant's wrongdoing.

[33] As such the plaintiffs are duty bound to prove that it was the defendants' act which caused the damage and that the damage caused is not too remote to the defendants' act.

[34] Both the plaintiffs and the defendants called expert witnesses to establish the cause of the collapse of the wall. However both the plaintiffs' expert witness and the defendants' expert witness gave differing evidence as to the cause of the collapse of the first plaintiff's retaining wall. The plaintiffs' expert witness, PW5, one Guo Yeang Yang, a civil engineer gave evidence that the cause of the collapse of the first plaintiff's wall was due to the excavation work carried out on the first defendant's land which affected the stability of the soil underneath the plaintiff's retaining wall and thus caused the wall to eventually collapse.

[35] The defendants' expert witness, DW7, was one Yee Thien Seng, a geotechnical engineer (who is also a professional consulting engineer) with an impressive curriculum vitae, maintained that the cause of the collapse was the defective construction of the first plaintiff's wall and not the excavation work carried out by the third defendant.

[36] PW5 prepared a report (exh. P18) on the cause of damage to the first plaintiff's property in July 1994, after a site visit. In evidence PW5 stated that he was retained by the first plaintiff immediately after the collapse of the wall for the purpose of carrying out remedial works on the first plaintiff's land, namely to reconstruct the toppled wall.

[37] Based on his observations as can be found in the report, he concluded that the cause of the collapse of the wall was due to the method of construction by the third defendant, namely in removing earth adjacent to the wall, which weakened the foundation of the wall and removed the restraint provided by existing earth. This caused the wall to move and eventually led to its collapse, which in turn also caused the failure of the existing slope on the first plaintiff's land and caused damage to the first plaintiff's bungalow.

[38] PW5 also referred to an analysis (exh. P44) which was conducted on the stability of the slope on which the retaining wall once stood. The analysis was for the purpose of ascertaining the stability of the slope prior and after the collapse of the retaining wall. PW5 said that the analysis was made after numerous visits were conducted to the site. At all times PW5 maintained that the analysis was prepared by him, but when cross-examined on the

same, he admitted that the report was prepared by his engineer, one Robert Teh but was checked by him. Further he admitted that the said Robert Teh was never present during any site visits.

[39] We, with due respect, find the credibility and evidence of the plaintiff's expert witness in doubt. His evaluation and subsequent findings of the cause of the collapse of the first plaintiff's retaining wall was based heavily on the analysis of the stability of the slope. However, the analysis was never prepared by him. As such he cannot be said to have personal knowledge of the analysis or calculations made therein. To make matters worse, the said analysis was prepared in April 1999, meaning that it was prepared some six years after the collapse of the wall (the wall collapsed in December 1993).

[40] As we have said earlier, PW5, in his report (exh. P18) opined that the cause of the collapse of the retaining wall was due to the excavation work carried out by the third defendant. PW5, however, did not test the stability and structure of the retaining wall. Had he done so, perhaps the inferences drawn from his findings would have been different. In cross-examination he admitted that the first plaintiff's wall had been badly constructed and that the reinforcement steel holding the wall had corroded. The cause of the corrosion was held to be due to cracks on the wall which encouraged water to seep in and corrode the reinforcement steel. The corrosion would over time lead to the wall collapsing once the reinforcement gives way.

[41] This evidence, we find, is consistent with what the defendants' expert evidence had to say about the collapse of the retaining wall.

[42] According to the evidence of the defendants' expert witness, DW7, based on his investigation, the collapse of the first plaintiff's retaining wall was not due to the excavation work carried out on the first defendant's land but was due to the structural inadequacy of the first plaintiff's wall. The conclusion made by DW7 on the collapse of the wall in the final report which he prepared is reproduced here:

> The retaining wall built up to hold up Lot 40536 had grossly inadequate reinforcement content. Its collapse was solely caused by its structural inadequacy.

> The fact that the wall did not collapse earlier cannot be taken to argue that its construction had been adequate. The timing of its collapse during the course of the excavation at Lot 40527 must therefore be pure coincidence.

[43] Having examined and analysed the evidence of both the expert witnesses, we are of the opinion that the cause of the plaintiff's wall collapsing was due to its precarious structure and condition. Both the expert witnesses admitted that there were existing cracks on the wall. This was made worse by the existence of plants growing within the cracks. All these are indications that the wall was already defective and in a deplorable state prior to its collapse. Therefore we find that the effective cause of the plaintiff's injury was due to the precarious condition of the wall. The excavation work carried out by the third defendant could have hastened the collapsing of the wall, if any, but cannot be the effective cause of the wall collapsing.

[44] In this regard, the 'but for' test is important in determining whether or not the defendants' act was the main factor causing the damage suffered by the plaintiffs'. The text in para. 2-09 in *Clerk & Lindsell* (above) states that:

> The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?

[45] In our judgment, we find on a balance of probabilities that the wall collapsed because of its defective structure and its precarious state. We find that PW5 failed to establish a causal link between the excavation work carried out by the third defendant which severely affected the stability of the slope, on which the first plaintiff's wall stood, with the subsequent collapse of the wall.

[46] As such, we find that the plaintiffs have failed to establish a causative link in proving that the collapse of the retaining wall was caused by the carrying out of the excavation work by the third defendant.

[47] While both the plaintiffs and defendants produced expert witnesses in court, the learned High Court judge, with respect, failed to give due consideration to the evidence of the expert witness called by the defence. This is how the learned judge treats the testimonies of the experts:

> 27. Both the Plaintiffs and Defendants had called expert evidence to substantiate each other's case. But expert evidence is only persuasive on the court which has to finally determine the liability. Having considered the expert testimony of both sides I am however inclined to say that whatever the technical opinions given, the fact remains that even though the Plaintiff's Retaining Wall was built on a land filled slope, it had remained intact for over 10 years since it was built. I do not think one can be wrong to assume that over the 10 years there must have been a lot of inclement weather which could have caused the said wall to collapse at one point or other if it was technically faulty. But it only collapsed after the earthwork was undertaken by the Defendants when the landslide occurred, thereby causing the Plaintiff's Retaining Wall to collapse.

[48] In the present case, the court was faced with two conflicting expert evidence on the cause of the collapse of the first plaintiff's wall. In treating conflicting expert evidence, the court, besides examining the credibility of the experts, should also examine the scientific grounds and facts relied by the experts and whether, when taken in totality, the inferences drawn from their findings are sound or otherwise (see *Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 1 LNS 3).

[49] In our judgment, the learned High Court judge fell into serious error in failing to give adequate consideration to the evidence of the defendants' expert witness DW7, who had prepared three reports on the cause of the collapse of the first plaintiff's retaining wall. Two of the reports were based on his investigation on site; and the third report was based on drawings supplied by the first plaintiff.

[50] We have carefully examined the reports of this witness and we are of the view that his evidence as to the cause of the collapse is more credible as opposed to the evidence of the plaintiffs' expert witness, PW5.

[51] We wish to add that the learned High Court judge, in his grounds of judgment, fell into error when he gave undue weight to the evidence of PW5 that the plaintiffs' wall was above the minimum standard in the factor of safety (FOS). Such evidence should have been weighed against the expert evidence of DW7. His failure to do so is a misdirection which warrants interference by this court.

[52] We are also dismissing the first defendant's appeal on the dismissal of her counter-claim. As we have said earlier, at the trial before the High Court, she had not come to court to testify as to what damage she had suffered as a result of the collapse of the first plaintiff's wall. Therefore, the learned High Court judge was correct in dismissing her counter-claim against the first plaintiff.